Supreme Court, U.S.
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No. 99-1915

IN THE

Supreme Court of the United States

JAMIE MESSENGER,

Petitioner,

v.

GRUNER + JAHR PRINTING AND PUBLISHING,
also known as GRUNER + JAHR, USA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

MITCHELL A. STEIN
Counsel of Record
ARTHUR M. LIEBERMAN
RICHARD STEVENS
LIEBERMAN & NOWAK, L.L.P.
Attorneys for Petitioner
350 Fifth Avenue, 74th Floor
New York, NY 10118
(212) 947-0500

162362

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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The petition for certiorari in the case at bar was docketed on May 31th. [# 99-1915]. No opposition papers have been filed. The matter is pending. *Paramount v. Wendt* [#99-1567], also pending before this Court, involves similar issues, and demonstrates that the Circuit Courts are in conflict over exploitation of the Constitutionally protected property interests and livelihood of models and entertainers under *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, at 574 (1977).

Petitioner first learned of *Paramount v. Wendt* in an article in the *L.A. Daily Journal*, July 17, 2000, Vol. 113, No. 137, page 1, and thus could not be proffered in the original petition.

SUPPLEMENTAL POINTS IN SUPPORT OF PETITION

I. THE NINTH CIRCUIT AND SECOND CIRCUIT HAVE REVIEWED SIMILAR ISSUES, YET FORMULATED ANTITHETICAL OUTCOMES WITH RESPECT TO CONSTITUTIONALLY PROTECTED PROPERTY INTERESTS.

In *Wendt*, Paramount argues that a copyright owner may license others to use robots that emulate characters in the television sitcom "Cheers," without any regard for the privacy and publicity rights of the actors themselves. The actors argue that it is the physical likeness to them, personally, not just the characters, that has commercial value and cannot be exploited without their consent.

The Ninth Circuit, analyzing the California statute that protects privacy and publicity rights (including virtually

identical language to that at issue in this petition), determined that the actors might, in fact, have a claim, but the question is one for the jury.

In contrast, however, the courts below have determined that no model may maintain a claim for violation of statutory rights of privacy and publicity by the non-consensual commercial misuse of her likeness where a court, without a jury, finds the misuse to be newsworthy.

In the case at bar, the jury determined the very issue of "confusing similarity" lying at the heart of the *Wendt* case, by finding that an ordinary reader would falsely believe that the story was about petitioner, when in fact it was not. Despite the jury's finding, however, the courts below have absolutely immunized all photographs and removed the commercial right of exploitation ordinarily owned by an actor and model, regardless of the issue of confusing similarity.

On May 22, 2000, this Court, in *United States v. Playboy*, 120 S. Ct. 1878 (2000) struck down as unconstitutional a blanket ban where "a less restrictive alternative" was available. If a blanket ban is unconstitutional, how, we respectfully posit, can a blanket protection (without regard to identity, content and intent) be constitutionally permissible?

The answer it, is not. That was this Court's edict in *Time Inc. v. Hill*, 385 U.S. 374 (1967) and unless this Court acts in the case at bar, the destruction of the Constitutionally protected right of privacy and publicity in the State of New York will be rendered immutable.

The similarity between *Wendt* and *Messenger*, concerning property interests, is evident. If the article in

Messenger was truly a current and newsworthy event, then the right to publish the photographs would live in the hands of the publisher. In essence, the publisher would own the property interests to the photographs for newsworthy use. There would be no right under ¶¶ 50-51 of the New York Civil Rights Act (the "statute").

As stated in *Binns*:

> [I]t would not be within the evil sought to be remedied by that act to construe it so as to prohibit the use of the name, portrait or picture of a living person in truthfully recounting or portraying an actual current event as is commonly done in a single issue of a regular newspaper.

Binns v. Vitagraph Co., 210 N.Y. 51, 56 (1913).

Where, however, the article or photograph is fictionalized, the Statute is applicable. As stated in *Binns*:

> The first picture of the series was essentially a picture of the plaintiff, although included therewith was a place having relation to the other parts of the pictures exhibited — but the last picture of the series had no connection whatever with any other place or person or with any event. His alleged personal movements as exhibited in the now well known form of moving pictures had no relation to the other pictures, and it was not designed to instruct or educate those who saw it. . . . By such pictures an audience would be amused and the maker of the films and the exhibitors would be enriched. . . . We hold that

> the name and picture of the plaintiff were used by the defendant as a matter of business and profit and contrary to the prohibition of the statute. It is urged that there is danger of serious trouble in the practical enforcement of any rule which may be adopted in construing and enforcing the statute so far as it relates to purposes of trade.

Binns, supra, 210 N.Y. at 58.

Therefore, the issues raised in *Wendt* and *Messenger* parallel. Paramount contends that there is a direct relation between the robots and the characters "Norm" and "Cliff" on "Cheers." Wendt contends that there is no relation between the robots and Cheers, but rather, there is commercial exploitation of the actors' likenesses themselves.

In *Messenger*, the jury determined that there was no connection between her photographs and the false and fictionalized story that the publisher now claims is protected by virtue of it being newsworthy, and that her image was being photographed for commercial profit by the publisher who had a contractual duty to inform the parents of the minor of the intended use. The photo session was held in private; the pictures were not taken in public. There could not be, as a matter of law, an implied waiver or consent by the minor. Further, the minor's livelihood was dependent on a favorable image that the photos were to set forth, in accordance with the representations made by the defendants to induce her involvement.

In no fashion was Ms. Messenger a member of the public who "voluntarily became part of the festival" as in *Murray v. New York Magazine*, 27 N.Y. 2d 406, 409 (1971).

Nor was she alongside a person who was admittedly a public figure, as in *Howell v. New York Post*, 81 N.Y. 2d 115, 118-119 (1991). Nor were her photographs an "external objective criteria" of a news topic who is "never mentioned, nor are any of the ideas or opinions it expresses attributed to him" as in *Arrington v. New York Times*, 55 N.Y. 2d 433, 441 (1982). Nor is this a case where a third party took pictures with the consent of the plaintiffs family in 1982, agreed with the photographer to use the photos in a particular manner, for which the photographer 6 years thereafter sold the picture to a magazine which annexed the picture to an objective news item. The photographer was never named in the suit and the news article never identified plaintiffs family in a negative light. *See Finger v. Omni Publs. Intl.*, 77 N.Y. 2d (1990).

II. THE NINTH CIRCUIT'S DETERMINATION THAT CONFUSING SIMILARITY (LIKE KNOWING FALSEHOOD) IS FOR THE JURY COMPORTS WITH *TIME v. HILL*, THE SECOND CIRCUIT'S CONTRARY FINDING DOES NOT.

The question of whether consumers will be confused into believing that the plaintiff actors consented to the use of their likenesses on robots in bars around the country was, in the Ninth Circuit's view, proper *solely* for a jury. *Wendt v. Host International*, 125 F.3d 806 (1997) [# 99-1567]. The question of whether consumers would be confused into believing that Ms. Messenger consented to the use of her picture with her purported autobiography was, in the Second Circuit's view, *never* to be reached by a jury if a Court (alone) found the autobiography to be newsworthy. This "new" impediment threatens to become permanent in New York, and ignores the reciprocal constitutional right of the model to be vindicated from gross fictionalization.

Messenger provides a case in which the courts have protected, rather than burdened, more speech than what is required. There can be no absolute immunity for the press to knowingly publish an article that is false and which causes damage to one's reputation, or invades upon a citizen's privacy. This has never been suggested by this Court. To do so now, in the new millennium, would reverse 200 years of case precedent acknowledging the inherent constitutional right of private citizens for vindication and or to "subsequently punish" the press for their abusive content and ridicule. *Patterson v. Colorado*, 205 U.S. 454, at 462 (1907), quoting *Commonwealth v. Blanding*, 3 Pick 304, 313, 314, 20 Mass 304 (1825). *See, also*, *Respubica v. Oswald*, 1 Dallas, 319, 325 (1788) and *Near v. Minnesota*, 283 U.S. 697, 714 (1931).

III. THE MERE FACT THAT A STATE STATUTE IS INVOLVED IN *MESSENGER* DOES NOT PRECLUDE REVIEW BY THIS COURT.

The controlling question here is solely whether the courts below have applied a state rule that incorrectly interprets the First Amendment. *Times v. Sullivan*, 376 U.S. 254, at 265 (1964).

When the language of the statute is not at issue *per se*, and the effect directly interferes with a constitutional right, this Court must retain jurisdiction to determine whether the interpretation of the statute passes constitutional muster. As this Court unanimously stated just seven years ago:

> There is no doubt that we are bound by a state court's construction of a state statute. . . . But here the Wisconsin Supreme Court did not, strictly

> speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase. Rather, it merely characterized the "practical effect" of the statute for First Amendment purposes. . . . This assessment does not bind us. Once any ambiguities as to the meaning of the statute are resolved, we may form our own judgment as to its operative effect.

Wisconsin v. Mitchell, 508 U.S. 476, 483- 484 (1993).

Here, the courts below did not review any specific language of the statute in issue. Rather, the courts below determined that regardless of statutory language, and regardless of a jury's finding, photographs falsely associating a model with a fictional and salacious autobiography are protected free speech under the First Amendment, even where the fictionalization is clear, gross, and intentional.

Accordingly, this Court has proper jurisdiction to review these findings.

CONCLUSION

It is respectfully requested that this Court grant the petition.

Respectfully submitted,

MITCHELL A. STEIN
Counsel of Record
ARTHUR M. LIEBERMAN
RICHARD STEVENS
LIEBERMAN & NOWAK, L.L.P.
Attorneys for Petitioner
350 Fifth Avenue, 74th Floor
New York, NY 10118
(212) 947-0500